No. 82-1608

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

vs.

ESTHER WUNNICKE ~~Robert LeResche~~, Commissioner of Department of Natural Resources of the State of Alaska, et al.,
Respondents,

KENAI LUMBER CO., INC.,
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

NORMAN C. GORSUCH
ATTORNEY GENERAL
(Counsel of Record)

MICHELE D. BROWN
ASSISTANT ATTORNEY GENERAL
State of Alaska
Department of Law
1031 West 4th Avenue,
Suite 200
Anchorage, Alaska 99501
(907) 276-3550
Counsel for State Respondents

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case

Statutes

No. 82-1608

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

vs.

ROBERT LERESCHE, Commissioner of Department of Natural Resources of the State of Alaska, et al.,
Respondents,

KENAI LUMBER CO., INC.,
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

The Solicitor General's brief imaginatively asserts that the Ninth Circuit's decision presents two dangers: (1) unbridled judicial speculation over "parallel" federal policy when state statutes affecting interstate commerce are challenged; and (2) undue restriction of the timber industry by the broad sanction of state regulation of the export of unprocessed timber. Neither danger results from nor is presented by the Ninth Circuit opinion.

A. The Alaska Primary Manufacture Requirement Furthers Express Federal Policy

The Solicitor General argues that there is a *per se* rule that only express Congressional authorization can validate an otherwise impermissible state regulation of interstate commerce. A *per se* rule is simply too restrictive and has never been required by this Court. Where it cannot be doubted that Congressional policy is furthered by a state regulation, the courts should not be precluded from upholding that regulation.

White v. Massachusetts Council of Construction Employers, Inc., 103 S. Ct. 1041 (1983), cited by the Solicitor General, demonstrates the point. In *White*, this Court found that federal statutes "intended to encourage revitalization, including improved opportunities for the poor, minorities, and unemployed" "affirmatively permit" a hiring preference for Boston residents. *Id.* at 1047. Nothing in those statutes "expressly" authorized the hiring preference.[1] Nonetheless, the preference was upheld because it "sounds a harmonious note" with the policy underlying the federal statutes and regulations. *Id.*

Alaska's primary manufacture requirement challenged here does more than sound "a harmonious note" with federal policy; it is in perfect consonance with it. As set out in more detail in Alaska's Brief in Opposition (pp. 3-5), federal policy since 1928 has been to limit the export of unprocessed logs from national forest lands in Alaska. The

---

[1]The regulations implementing those statutes authorized a preference for persons residing in the general area of the subject projects, but even they did not sanction a preference limited to residents of a particular political subdivision.

Solicitor General notes that "[t]he objective of the federal timber policy for national forest lands, as set forth in the Organic Administration Act of 1897, 15 U.S.C. 475 (Pet. App. 22a), is to secure 'favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States.'" (U.S. Br. 8). 36 C.F.R. § 223.10(c) implements that Act by barring the export of unprocessed timber from national forest lands in Alaska "to ensure the development and continued existence of adequate wood processing capacity in that State [Alaska] for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities."

Express federal policy is, therefore, that development and maintenance of processing facilities in Alaska is in the national interest, and that policy is furthered by requiring that timber from federal lands be processed in those facilities prior to shipment. The parallel Alaska requirement simply preserved the federal requirement when the federal timber lands were conveyed to the state under Section 6 of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 330 (1958). Finding Alaska's primary manufacture requirement unauthorized under these facts would thwart an express Congressional policy which is more than fifty years old.

The Ninth Circuit did not have to "speculate" about federal policy for Alaska timber. 36 C.F.R. § 223.10(c) bars the export of unprocessed timber from national forest lands in Alaska "to ensure the development and continued existence of adequate wood processing capacity" in Alaska. Processing facilities will not be developed and maintained

in Alaska if there is not an assured supply of timber or if it is more profitable to export timber without in-state primary processing.

It is significant that primary manufacture was required as a term of the proposed sale which gave rise to this case in order to assure a continuing supply of timber for existing mills in southeast and southcentral Alaska during a temporary shortage of federal timber. E.R. 121-122. If Alaska did not have a primary manufacturing requirement, the express federal policy of ensuring the "continued existence of adequate wood processing capacity" in Alaska would be frustrated by the closing of the existing mills. The incidental benefits to local processors from the federal policy and from the state's furtherance of that policy do not invalidate the long standing determination that such a policy benefits the nation as a whole by promoting the sustained utilization of timber.

The Ninth Circuit opinion is not an invitation for unlimited "parallel" policy comparisons between every state statute affecting commerce and a purportedly ambiguous federal policy. It is a proper recognition that this well-defined and articulated federal policy[3] and the challenged

---

[3]The Solicitor General speculates that Congress may not favor a ban on the export of timber from federal lands in Alaska, citing the fact that Congress exempted Alaska from the prohibition on the export of unprocessed western red cedar contained in the Export Administration Act of 1979. 50 U.S.C. app. § 2406 (Supp. III 1979) (Pet. App. 28a); 50 U.S.C. app. 2406(i)(1) (Supp. V); Act of Nov. 27, 1979, Pub. L. No. 96-126, Section 308, 83 Stat. 980 (1979). (Pet. App. 30a).

The Solicitor's speculative inference is unsupported. When Congress passed the Alaska red cedar exemption, it was certainly aware of the well-established federal timber policy for Alaska found in

state requirement are virtually identical and accomplish the same purpose. The lower courts are fully capable of applying such an analysis and distinguishing situations in the future where such unity of purpose is not present.

B. The Ninth Circuit's Decision Has No Significant Impact on the Timber Industry Outside Alaska

The Solicitor General again paints with too broad a brush the dangers to be feared from other state restrictions on the export of unprocessed logs. Three other states have required in-state primary manufacture for many years.[a] However, Alaska alone is singled out by federal policy for the express necessity of developing remote site processing. 36 C.F.R. §223.10(c). And, Alaska alone has enacted a corresponding state primary manufacturing requirement which is virtually identical to its federal counterpart. Alaska Stat. § 38.05.115 (1976); Alaska Admin. Code tit.11, § 71.230 (1982). (Pet. App. 19a-21a).

---

36 C.F.R. § 223.10(c). Congress did nothing to alter that policy in 1979, when it enacted the Alaska red cedar exception, and that policy remains the same today.

The western red cedar exception does not conflict with 36 C.F.R. § 223.10(c); rather, it is in complete accord with it. 36 C.F.R. § 223.10(c)(5) authorizes the export of unprocessed timber "to provide material required to meet urgent and unusual needs of the Nation." (Pet. App. 35a). Western red cedar was in short supply and Congress took action to balance domestic needs and export requirements for that particular timber only. Congress' silence on the federal and state primary manufacture requirement for all other types of Alaska timber indicates Congressional approval of that policy. The red cedar legislation also demonstrates that Congress will act when it believes there is a matter of national concern in allocating exports. (See U.S. Br. 10).

[a]Cal. Pub. Res. Code § 4650.1 (West Supp. 1982); Idaho Code § 58-403 (1974); Or. Rev. Stat. § 526-805 (1981). (Pet. App. 36a-38a).

36 C.F.R. § 223.10(b) and 43 C.F.R. § 5400.0-3(c) ban the export of unprocessed timber from national forest and other federal lands located west of the one-hundredth meridian in the contiguous forty-eight states. Only in 36 C.F.R. § 223.10(c), which refers only to Alaska, is it expressly stated that the primary manufacture requirement is necessary to assure the continued vitality of the wood processing industry. In order to assure a timber supply to effectuate this stated purpose, 36 C.F.R. § 223.10 (c) bans both interstate and foreign shipment of unprocessed timber, covers all timber, and limits exceptions to five very specific grounds. By contrast, 36 C.F.R. § 223.10 (b) and 43 C.F.R. § 5400.0-3(c) ban only foreign export and exclude all surplus domestic timber. It is clear then that the federal policy for Alaska timber lands is distinctly different than the policy pertaining to federal timber lands in other states.

Furthermore, only Alaska's primary manufacture requirement contains the same provisions as the federal regulation to accomplish the corresponding federal policy. Each of the other state statutes require primary manufacture by means far more stringent than their federal counterpart. For instance, Idaho requires in-state primary manufacture for timber destined for both domestic and foreign markets, while the federal regulations for federal lands in Idaho require in-state processing prior to foreign export only. Unlike the corresponding federal regulation, California, Idaho and Oregon all require primary manufacture for all state timber without exception for domestic surplus. Alaska's primary manufacture requirement, on the other hand, covers the same markets and the same

timber, and allows the same exceptions, as does the federal regulation for federal land in Alaska.

For these reasons, the Ninth Circuit's decision does not broadly sanction all state regulation of the export of unprocessed timber and, therefore, has little precedential value.

CONCLUSION

The Ninth Circuit reached the correct result on a narrow issue of Congressional consent in an unique situation where Congressional intent was unequivocal and the state statute clearly furthers that express intention. The petition for a writ of certiorari should be denied.

Respectfully submitted,

NORMAN C. GORSUCH
ATTORNEY GENERAL
(Counsel of Record)

MICHELE D. BROWN
ASSISTANT ATTORNEY GENERAL
State of Alaska
Department of Law
1031 West 4th Avenue,
Suite 200
Anchorage, Alaska 99501
(907) 276-3550
Counsel for State Respondents

September 16, 1983.